Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–959–95
JEFFREY TAN J
14 MARCH 1997

Civil Procedure *— Jurisdiction — Declaration — Whether syariah court has jurisdiction to entertain application for declaration — Whether High Court has exclusive power to grant declaration*

Civil Procedure *— Stay of proceedings — Forum conveniens — Application for declaration to determine validity of trust — Settlor domiciled in India — Subject matter of trust not entirely in Malaysia — Whether stay ought to be granted so that application can be made to court in India*

The settlor (the plaintiff's mother who passed away in 1989), an Indian national domiciled in India, had created a trust deed and appointed the plaintiff as lawful attorney with the powers to take possession of all assets in Malaysia, Singapore and other countries. The plaintiff filed an application to determine whether the assets in Malaysia and Singapore formed the subject matter of a valid and subsisting trust or whether those assets were never validly transferred to the trust and therefore formed part of the settlor's residuary estate to be distributed amongst her beneficiaries in accordance with Islamic religious law. In the trust deed, the settlor declared that the trust was a 'wakaf-au-alad and shall not fall within the jurisdiction of the "wakaf board"'. Counsel for the third defendant, relying on art 121(1A) of the Federal Constitution, raised the preliminary objection that only the syariah court had the jurisdiction to determine the questions put forward by the plaintiff. The plaintiff and his siblings (the first and second defendants), however, contended that the High Court had jurisdiction and that the syariah court had none. Counsel for the second defendant submitted further that although the High Court had jurisdiction to determine the matter raised by the plaintiff, he urged the court not to exercise that jurisdiction as the appropriate forum and proper law to determine the matter was India and the law of India. He urged the court to stay this proceedings so that an application could be made to the Indian courts.

Held, staying the proceedings:

(1) The syariah court had no power to grant the relief applied for by the plaintiff because, according to the Specific Relief Act 1950 and O 15 r 16 of the Rules of the High Court 1980, the power to grant a declaratory decree was that of the High Court (see p 398H).

(2) Where on forum conveniens grounds a stay was sought, the court must strike a balance between the right of the plaintiff to choose his forum and the right of the defendant that he should

not be required to take part in litigation before a court inappropriate for that litigation. In striking the balance, all the circumstances relevant to the parties and to the litigation were proper to be taken into account (see p 400C); *Chellaram & Ors v Chellaram & Ors* [1985] 1 Ch 409 followed.

(3) The place of the administration of the trust must be interpreted from: (i) the settlor's designated name for the trust; (ii) the settlor's place of residence; and (iii) the terminology used. In this case, these factors pointed to India as the place where the object of the trust was to be fulfilled (see p 401A–C); *James Capel (Far East) Ltd v YK Fung Securities Sdn Bhd* [1996] 2 MLJ 97 followed.

(4) In any event, Malaysian law would not be able to give effect to the settlor's wish that the trust should not fall within the jurisdiction of the wakaf board as the Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 vested in the Majlis Agama Pulau Pinang all wakaf properties which meant that the trust would fall within the jurisdiction of the wakaf board (see p 401G).

(5) Furthermore, considering that: (i) the proper forum to grant letters of administration for the estate of the settlor was in India; (ii) the witnesses to the instruments, ie the trust deed and the power of attorney, were from India; (iii) the subject matter was not entirely in Malaysia; (iv) witnesses to explain the terminology in the settlor's instrument would most reasonably be from India; and (v) the beneficiaries who would benefit from the trust would be in India, the Indian court would be the appropriate forum to determine the plaintiff's application (see p 402B–D).

[Bahasa Malaysia summary

Pembuat 'settlement' (ibu plaintif yang telah meninggal dunia dalam tahun 1989), seorang warganegara India yang berdomisil di India, telah mewujudkan suatu suratikatan amanah yang telah melantik plaintif sebagai wakil yang sah dengan kuasa untuk mengambilalih kesemua harta di Malaysia, Singapura dan negara lain. Plaintif telah memfailkan suatu permohonan untuk menentukan sama ada harta di Malaysia dan Singapura merupakan subjek perkara suatu amanah yang wujud dan sah ataupun sama ada harta tersebut tidak pernah dipindahkan kepada amanah secara sah dan oleh itu ianya merupakan sebahagian daripada estet bakian pembuat 'settlement' untuk dibahagikan di antara benefisiarinya menurut undang-undang agama Islam. Dalam suratikatan amanah tersebut, pembuat 'settlement' telah mengisytiharkan bahawa amanah tersebut merupakan satu 'wakaf-au-alad dan tidak harus termasuk dalam bidang kuasa "lembaga wakaf"'. Peguam untuk defendan ketiga, sambil bergantung ke atas perkara 121(1A) Perlembagaan Persekutuan, telah membangkitkan bantahan permulaan bahawa hanya mahkamah syariah mempunyai bidang kuasa untuk memutuskan persoalan-persoalan yang dikemukakan oleh plaintif. Plaintif dan adik-beradiknya (defendan

A pertama dan kedua) telah berhujah bahawa Mahkamah Tinggi mempunyai bidang kuasa dan bukannya mahkamah syariah. Peguam bagi defendan kedua telah berhujah bahawa walaupun Mahkamah Tinggi mempunyai bidang kuasa untuk memutuskan perkara yang dibangkitkan oleh plaintif, beliau meminta supaya mahkamah tidak melaksanakan bidang kuasa tersebut kerana forum yang wajar dan B undang-undang yang patut terpakai untuk menentukan perkara ini adalah India dan undang-undang India. Beliau meminta mahkamah menggantungkan prosiding ini supaya satu permohonan boleh dibuat kepada mahkamah di India.

C **Diputuskan,** menggantungkan prosiding:

(1) Mahkamah syariah tidak mempunyai kuasa untuk memberikan relief yang dipohon oleh plaintif kerana, menurut Akta Relief Spesifik 1950 dan A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980, kuasa untuk memberikan dekri pengisytiharan adalah milik D Mahkamah Tinggi (lihat ms 398H).

(2) Di mana atas alasan forum conveniens satu penggantungan dipohon, mahkamah mesti membuat satu imbangan di antara hak plaintif untuk memilih forumnya dan hak defendan sepaya beliau tidak dikehendaki mengambil bahagian dalam litigasi di E depan satu mahkamah yang tidak sesuai untuk litigasi itu. Dalam membuat imbangan itu, semua keadaan-keadaan kes yang relevan kepada pihak-pihak dan kepada litigasi mestilah dipertimbangkan (lihat ms 400C); *Chellaram & Ors v Chellaram & Ors* [1985] 1 Ch 409 diikut.

(3) Tempat pentadbiran amanah ini harus ditafsirkan dari: (i) nama F khas yang diberikan oleh pembuat 'settlement' kepada amanah tersebut; (ii) tempat bermastautin pembuat 'settlement'; dan (iii) istilah yang digunakan. Dalam kes ini, faktor-faktor tersebut menunjukkan bahawa negara India adalah tempat di mana objek amanah tersebut harus dipenuhi (lihat ms 401A–C); *James Capel* G *(Far East) Ltd v YK Fung Securities Sdn Bhd* [1996] 2 MLJ 97 diikut.

(4) Apa sekalipun, undang-undang Malaysia tidak dapat memberi kesan kepada kehendak pembuat 'settlement' bahawa amanah itu tidak termasuk dalam bidang kuasa lembaga wakaf kerana Enakmen Pentadbiran Hal Ehwal Agama Islam Negeri Pulau H Pinang 1993 meletakhak pada Majlis Agama Pulau Pinang kesemua harta wakaf yang bermakna bahawa amanah tersebut akan termasuk dalam bidang kuasa lembaga wakaf (lihat ms 401G).

(5) Selanjutnya, memandangkan bahawa: (i) forum yang wajar untuk memberikan suratkuasa pentadbiran untuk harta pembuat 'settlement' adalah di India; (ii) saksi-saksi kepada instrumen, I iaitu suratikatan amanah dan surat kuasa wakil adalah dari India; (iii) subjek perkara tidak sepenuhnya berada di Malaysia; (iv) saksi-saksi untuk menerangkan istilah dalam instrumen pembuat 'settlement' berkemungkinan secara munasabah adalah dari India; dan (v) benefisiari yang akan mendapatkan faedah dari amanah

itu berada di India, maka mahkamah India adalah forum yang wajar untuk memutuskan permohonan plaintif (lihat ms 402B–D).] A

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160 (refd) B
Chellaram & Ors v Chellaram & Ors [1985] 1 Ch 409 (folld)
Dalip Kaur v Balai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)
Eng Liat Kiang v Eng Bak Hern & Ors [1995] 1 SLR 577 (refd)
James Capel (Far Fast) Ltd v YK Fung Securities Sdn Bhd [1996] 2 MLJ 97 (folld) C
Lim Chan Seng v Pengarah, Jabatan Ugama Islam Pulau Pinang (Penang High Court, Suit No 24–713–95, unreported) (refd)
Mohd Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)
Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Anor [1992] 2 MLJ 244 (refd) D
Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2) [1991] 3 MLJ 487 (refd)
Spiliada Maritime Corp v Cansulex Ltd (The Spiliada) [1987] 1 AC 460 (refd)
Woh Hup (Pte) Ltd v Property Development Ltd [1991] 3 MLJ 82 (refd) E

Legislation referred to

Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 s 48 F
Federal Constitution arts 74, 75, 77, 121(1), (1A), Sch 9 List I, Sch 9 List II, Sch 9 List III
Courts of Judicature Act 1964 ss 22, 23, 24, 25(1)
Civil Law Act 1956 s 3(1)(a)
Rules of the High Court 1980 O 15 r 16
Specific Relief Act 1950 G

A Suppiah (*Presgrave & Matthews*) for the plaintiffs.
Toh Lee Hong (*Chew Tan & Lim*) for the first defendant.
Ramdas Tikamdas (*Siva Ram & Associates*) for the second defendant.
Mohd Nasfu Afandi bin Kamaruddin (Federal Counsel) for the Attorney General. H
Abu Baker for the Majlis Agama Pulau Pinang.

Jeffrey Tan J: This is an application to the court to 'determine' whether the assets in Malaysia and Singapore of the plaintiff's mother, an Indian national domiciled in India, one Hadijabeevi ('the settlor'), on the construction of: (i) the settlor's deed of trust dated 19 May 1985; (ii) the settlor's grant of a power of attorney dated 27 June 1985; and (iii) the settlor's written instructions dated 27 July 1985, form the subject matter I

A of a valid and subsisting trust, or whether those assets 'were never validly transferred' to the trust whilst the deceased was alive and are therefore a part of the settlor's residuary estate (the settlor passed away in 1989) to be distributed amongst her beneficiaries in accordance with Islamic religious law.

B In the aforesaid deed of trust, the settlor declared her creation of a trust. She named her trust the 'Hadijabe Trust' in Koothanallur ('the trust'). She further declared that the monetary capital of the trust 'shall be derived from the money to be contributed by me from time to time and thereafter the movable properties from donations'. She appointed herself as the sole trustee during her lifetime. She specified that 60% of the annual C profits of the trust shall be for her exclusive use, while the balance of 40% shall be used towards specified charities, and specified charitable purposes. She named the trustees to succeed her, authorized those trustees after her 'to take 10% of the income of the trust for their efforts and expenses' and directed that 'the balance 90% shall be used for charitable purposes'. She D further declared, 'this trust is a "wakaf-au-aulad" ... and shall not fall within the jurisdiction of the wakaf board'.

On 27 June 1985, about a month after her execution of the trust deed, the settlor appointed the plaintiff as her lawful attorney with the powers, inter alia, to take possession of 'all assets of Hadijabe Trust in Malaysia, Singapore and other countries inclusive of shares, dividends, E income, bank accounts, documents, properties, immovable and movable, etc'. The preamble to the deed appointing the plaintiff as the settlor's attorney reads as follows:

> Whereas I have endowed a charitable organization called 'Hadijabe Trust' at Koothanallur, Nidamangalam Taluq in India of which I am the sole F trustee;
>
> Whereas in respect of the said trust, I had intended to have all my shares in foreign companies transferred in its name so that it will have enough income;
>
> Whereas in respect of such transfer of shares, earnings of dividend income etc, I cannot be personally present in foreign countries; G

It was on the settlor's declaration, 'this trust is a wakaf-au-aulad', that learned federal counsel for the third defendant raised the preliminary but substantial objection that only the syariah court has jurisdiction to determine the questions put forward by the plaintiff. The plaintiff and his siblings, H the first and second defendants, contended however that the High Court has jurisdiction and that the syariah court has none.

In his submission, learned federal counsel drew the court's attention to art 121(1A) of the Federal Constitution which reads:

> The courts referred to in cl 1 shall have no jurisdiction in respect of any I matter within the jurisdiction of the Syariah courts.

Both the High Court and syariah court, albeit the High Court is a basic institution provided for expressly by the supreme law of the land, the Federal Constitution, while the syariah court is established by a state enactment, are creatures of statute.

The High Court, as provided by art 121(1), has the jurisdiction and powers as may be conferred by or under Federal law. Sections 22, 23 and 24 of the Courts of Judicature Act 1964 ('the CJA 1964') set out in broad terms the criminal and civil jurisdiction of the High Court. Section 25(1) of the CJA 1964 provides that the High Court:

> ... shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

The High Court also has the additional powers set out in the Schedule to the CJA 1964. Section 3(1)(a) of the Civil Law Act 1956, effective 7 April 1956, provides that:

> ... a court of competent jurisdiction administering civil law in West Malaysia shall apply the common law of England and the rules of equity as administered in England on 7 April 1956.

As noted earlier, the syariah court is also a creature of statute. Articles 74 and 77 of the Federal Constitution read as follows:

> 74 (1) Without prejudice to any power to make laws conferred on it by any other article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).
>
> (2) Without prejudice to any power to make laws conferred on it by any other article, the legislature of a state may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.
>
> (3) The power to make laws conferred by this article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.
>
> (4) Where general as well as specific expressions are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.
>
> 77 The legislature of a state shall have power to make laws with respect to any matter not enumerated in any of the Lists set out in the Ninth Schedule, not being a matter in respect of which Parliament has power to make laws.

Therefore, in the distribution of legislative powers, the Federal Constitution provides that a legislature of a state may make laws, without prejudice however to the federal legislature's powers to make laws with respect to any of the matters enumerated in the federal list or the concurrent list (ie First or Third Lists set out in the Ninth Schedule), with respect to any of the matters enumerated in the state list (ie the Second List set out in the Ninth Schedule) or the Concurrent Lists. Indeed, art 75 specifically provides that any state law inconsistent with a Federal law 'shall be void'. It could be noted that the power to make laws with respect to equity and trusts vests with the federal and not the state legislature (see First List of the Ninth Schedule read together with art 74(1)) .

With regard to the State List, that is the Second List of the Ninth Schedule, it reads:

List II — State List

1 Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the state; Malay customs; zakat fitrah and baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom.

2 Except with respect to the Federal Territories of Kuala Lumpur and Labuan, land including:

(a) Land tenure, relation of landlord and tenant, registration of titlesand deeds relating to land, colonization, land improvement and soil conservation, rent restriction;

(b) Malay reservations or, in the States of Sabah and Sarawak, native reservations;

(c) Permits and licences for prospecting for mines, mining leases and certificates;

(d) Compulsory acquisition of land;

(e) Transfer of land, mortgages, leases and charges in respect of land, easements; and

(f) Escheat, treasure trove excluding antiquities.

3 Except with respect to the Federal Territories of Kuala Lumpur and Labuan, agriculture and forestry, including:

(a) Agriculture and agricultural loans; and

(b) Forests.

4 Local government outside the Federal Territories of Kuala Lumpur and Labuan, including:

(a) Local administration; municipal corporations; local, town and rural board and other local authorities; local government services, local rates, local government elections;

(b) Obnoxious trades and public nuisances in local authority areas; and

(c) (*Repealed*). A

5 Except with respect to the Federal Territories of Kuala Lumpur and Labuan, other services of a local character, that is to say:

(a) (*Repealed*);

(b) Boarding houses and lodging houses;

(c) Burial and cremation grounds; B

(d) Pounds and cattle trespass;

(e) Markets and fairs; and

(f) Licensing of theatres, cinemas and places of public amusement.

6 State works and water, that is to say: C

(a) Public works for State purposes;

(b) Roads, bridges and ferries other than those in the Federal List, regulation of weight and speed of vehicles on such roads; and

(c) Subject to the Federal List, water (including water supplies, rivers and canals); control of silt; riparian rights. D

7 Machinery of the State Government, subject to the Federal List, but including:

(a) Civil List and State pensions;

(b) Exclusive State services;

(c) Borrowing on the security of the State Consolidated Fund; E

(d) Loans for State purposes;

(e) Public debt of the State; and

(f) Fees in respect of any of the matters included in the State List or dealt with by State law.

F

8 State holidays.

9 Creation of offences in respect of any of the matters included in the State List or dealt with by State law, proof of state law and of things done thereunder, and proof of any matter for purposes of State law.

10 Inquiries for State purposes, including commissions of inquiry and collection of statistics with respect to any of the matters included in the State List or dealt with by State law. G

11 Indemnity in respect of any of the matters in the State List or dealt with by State law.

12 Turtles and riverine fishing. H

12A Libraries, museums, ancient and historical monuments and records and archaeological sites and remains, other than those declared to be federal by or under federal law.

In the state of Pulau Pinang, the state legislature enacted, pursuant to arts 74 and 77 read together with the Second List of the Ninth Schedule, the I Administration of Islamic Religious Affairs Enactment of the State of Penang 1993 ('the Enactment'), an enactment concerning the administration and enforcement of Islamic religious affairs, regulation and management of Islamic religious authority and related matters. In particular, s 48 of the Enactment reads as follows:

A 48(1) A Syariah High Court shall have jurisdiction throughout the State of Penang and shall be presided over by a syariah judge.

(2) A Syariah High Court shall:

(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this enactment or under any B other written law prescribing offences against precepts of the religion of Islam for the time being in force, and may impose any punishment provided therefor;

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to:

C (i) betrothal, marriage, *ruju'*, divorce, nullity of marriage (*fasakh*), *nusyuz* or judicial separation (*faraq*) or other matters relating to the relationship between husband and wife;

(ii) any disposition of, or claim to, property arising out of any D of matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadhanah*) of infants;

(iv) the division of, or claims to, *harta sepencarian*;

(v) wills or death-bed gifts (*marad-al maut*) of a deceased Muslim; E

(vi) gifts *inter vivos*, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) *wakaf* or *nazar*;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the F estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

(x) other matters in respect of which jurisdiction is conferred by any written law.

G Clearly, art 121(1A), effective 10 June 1988, is a marker delineating the extent of the High Court's jurisdiction as it took away the jurisdiction of the High Court in respect of any matter within the jurisdiction of the syariah court (see *Mohd Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793).

In *Lim Chan Seng v Pengarah, Jabatan Ugama Islam Pulau Pinang* H (Penang High Court Suit No 24–713–95, unreported), Abdul Hamid J asked, 'Apakah kesan peruntukan perkara 121(1A) itu?'. His Lordship replied, soliloquy-like:

> Perkara 121(1A) bukan memberi bidang kuasa kepada mahkamah syariah. Tetapi ia cuma mengatakan jika sesuatu perkara itu terletak dalam bidang I kuasa mahkamah syariah maka Mahkamah Tinggi dan mahkamah bawah tidak mempunyai bidang kuasa mengenainya.

The learned judge held: (i) to determine whether the High Court has jurisdiction in any matter, it must be established foremost whether the jurisdiction in the matter concerned is with the syariah court; (ii) where

jurisdiction is with the syariah court it would not be with the civil courts; (iii) the jurisdiction and powers of the syariah court is in the state enactment concerned, and by any other law; (iv) art 121(1A) does not automatically vest the syariah court with jurisdiction; (v) legislation by the state legislature is required if the syariah court is to be vested with the jurisdiction and powers on any matter in the State list; and (vi) it is within the province of the High Court to interpret all state laws concerning the administration of Islamic law (see also *Dalip Kaur v Balai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1).

That syariah courts derive their jurisdiction from state laws, or for the Federal Territories, an Act of Parliament, over any matter in the State List under the Ninth Schedule of the Federal Constitution was also upheld in *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487, where Eusoff Chin J (as he then was) pronounced: (i) if state law does not confer on the syariah court any jurisdiction to deal with any matter in the state list, the syariah court is precluded from dealing with the matter; and (ii) jurisdiction cannot be derived by implication.

A further illustration of the ouster of the civil court only if the syariah court is vested with jurisdiction and powers is *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Anor* [1992] 2 MLJ 244, where the then Supreme Court held — dismissing the appeal against the decision of the High Court to dismiss the appellant's application to set aside the respondents' claim, inter alia, for a declaration and for a perpetual injunction to restrain the appellant's intended demolition of a mosque on land originally given as 'wakaf am' — that the real order asked for was the perpetual injunction, and that the syariah court had no jurisdiction to issue the injunction applied for by the respondents.

Likewise in the instant case, the real order asked for, even though in the form of two questions, is a declaration on the status of the assets of the settlor in Malaysia and Singapore — whether they were 'transferred' to the Hadijabe Trust of Koothanallur, or whether they were part of the residuary estate to be distributed to the settlor's beneficiaries. The syariah court has no power to grant the relief applied for by the plaintiff as the power to grant a declaratory decree is undoubtedly that of the High Court (see the Specific Relief Act 1950 and O 15 r 16 of the Rules of the High Court 1980), as much as it is the province of the High Court to construe and interpret the 'deeds' of the settlor to determine if there is a valid trust.

Mr Ramdas, for the second defendant, conceded that this court has the jurisdiction to determine the matter raised by the plaintiff. However, he urged this court, on the doctrine of forum non conveniens, to decline to exercise that jurisdiction. He contended that the appropriate forum and the proper law to determine the matter is India and the law of India becuase; (i) the settlor was an Indian national domiciled in India ; (ii) the instruments in question were prepared and executed in India; (iii) the instruments referred to a trust in Koothanallur, India; (iv) the second defendant, although a permanent resident of Malaysia, is a citizen of India; (v) the 'trust' referred to 'dhargas', a term peculiar to India, 'wakaf board' and 'wakaf-au-aulud'; terms that require, in a proceeding in Malaysia, an

explanation from witnesses to its meaning, and those witnesses would be witnesses of fact such that an appeal from a proceeding in Malaysia would be an appeal on fact alone rather than on fact and on law, as would be the case if the proceedings were heard in India; (vi) the deed of trust has the most natural and substantial connection with India; and (vii) that probate would have to be taken in India. He submitted that the instant proceedings should be stayed. He also said that he would file a formal application if need be, and that reasonable time be given to any of the parties to file a similar application before the Indian courts.

The plea forum non conveniens is normally raised by defendants domiciled in a foreign country against whom jurisdiction has been founded by arrestment, who desire to have the case raised against them, or the claim thereby maintained, decided in the court of their domicile (see *Trayner's Latim Maxims* (4th Ed, Reprint 1993) at p 228). In *Eng Liat Kiang v Eng Bak Hern & Ors* [1995] 1 SLR 577, it was raised in the Singapore High Court by a defendant domiciled in Singapore, and it was sustained. In that case, Judith Prakash JC (as she then was) pointed out that Lord Goff had 'established' (with respect, it should be restated), in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] 1 AC 460, the principles guiding the discretion of the court whether to sustain or to repel the plea forum non conveniens. The law restated by the House of Lords is summarized in the third cumulative supplement to Dicey & Morris on *Conflict of Laws* (11th Ed) at paras 393–395 as follows:

(a) the basic principle is that stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, ie in which the case may be tried more suitably for the interests of all the parties and the ends of justice;

(b) the legal burden of proof is on the defendant but the evidential burden will rest on the party who asserts the existence of a relevant factor;

(c) the burden is on the defendant to show both that England is not the natural or appropriate forum and also that there is another available forum which is clearly or distinctly more appropriate than the English forum;

(d) the court will look to see what factors there are which point to the direction of another forum, as being the forum with which the action has the most real and substantial connection, eg factors affecting convenience or expense (such as availability of witnesses), the law governing the transaction and the places where the parties reside or carry on business;

(e) if at that stage the court concludes that there is no other available forum which is clearly more appropriate it will ordinarily refuse a stay;

(f) if there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted and, in this inquiry the court will consider all the circumstances of the case. But the mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England is not decisive; regard must be had to the interests of all the parties and the ends of justice.

In *Chellaram & Ors v Chellaram & Ors* [1985] 1 Ch 409 at p 434, Scott J summarized it thus:

> ... the authorities establish that in all cases where on forum conveniens grounds a stay is sought, the court must strike a balance between the right of the plaintiff to choose his forum and the right of the defendant that he should not be required to take part in litigation before a court inappropriate for that litigation. In striking the balance, all the circumstances relevant to the parties and to the litigation are proper to be taken into account.

One important factor that a Malaysian court must consider in connection with forum non conveniens is 'whether it would be unjust to the plaintiff to confine him to remedies elsewhere' (per Peh Swee Chin FCJ in *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160 at p 167).

In the instant case, the following facts relied on by the second defendant were not in dispute. The settlor was an Indian national domiciled in Koothanallur, India. The trust deed and power of attorney were prepared and executed in India. The settlor designated the 'trust' as a trust in Koothanallur, India. The second defendant, a permanent resident of Malaysia, is a citizen of India. The terms 'dhargas', 'wakaf board' and 'wakaf-au-aulud' require explanation from expert witnesses. The beneficiaries or potential beneficiaries benefiting from the settlor's charity, if indeed there is a valid charitable trust, would be those domiciled in India.

The following facts relied on by the plaintiff and the first defendant, who supports the plaintiff's application, were not in dispute. The trustees named by the settlor are Malaysians. The settlor designated all her Malaysian shares as the subject matter of her charitable trust.

Miss Toh Lee Hong, for the second defendant, pointed to the following passage in 8 *Halsbury's Laws of England* (4th Ed) at para 941 which reads:

> A trust is governed by the law chosen by the settlor; the choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case. Where no applicable law has been chosen (or where the chosen law does not provide for trusts or the category of trust involved), a trust is governed by the law with which it is most closely connected reference is to be made in particular to: (i) the place of administration of the trust designated by the settlor; (ii) the situs of the assets of the trust; (iii) the place of residence or business of the trustee; and (iv) the objects of the trust and the places where they are to be fulfilled.

However, the latter alone could not settle the applicable law. The place of administration of the trust, in the absence of the settlor's express designation, must necessarily be interpreted from: (i) the settlor's designated name for the trust — the Hadjabe Trust in Koothanallur, India; (ii) the settlor's place of residence — Koothanallur; (iii) terminology 'dhargas', 'wakaf-au-aulad' and 'wakaf board'. They point to Koothanallur, India as the place where the object of the trust is to be fulfilled (see *James Capel (Far East)*

Ltd v YK Fung Securities Sdn Bhd [1996] 2 MLJ 97 where Peh Swee Chin FCJ held that in determining the proper law of a contract, in the absence of an express choice, it would be inferred from the terms or form of contract or its surrounding circumstances — eg the presence of a choice of forum clause, the use of terminology peculiar to a system of law and the currency used — and the court will adopt the system of law with which the transaction had the closest and most real connection, eg the place of performance of the contract, the place where the contract was made and where there is a clear preponderance of the latter factors; see also *Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82). On the other hand, the situs of the subject matter, but not the entire subject matter, is in Malaysia, and the trustees' place of residence is also in Malaysia.

It is now an opportune juncture to revert to *Chellaram & Ors v Chellaram & Ors*. At p 432 is the following dictum:

> The rights of the trustees are enjoyed as against the beneficiaries; the duties of the trustees are owed to the beneficiaries. If the rights of the beneficiaries are to be ascertained by applying the proper law of the settlement, I do not understand how the duties of the trustees can be ascertained by applying a different law, and vice versa. In my judgment, a conclusion that the law of the place of administration of a settlement governs such matters as the rights and duties of the trustees can only be right if that law is the proper law governing the settlement.

Therefore, even if the trust is to be administered in Malaysia, by reason of the situs of part of the subject matter and the residence of the trustees, it does not follow simpliciter that the rights and duties of the trustees are governed by Malaysian law and that Malaysian law is the proper law (because the rights of beneficiaries are to be ascertained by the proper law of the settlement and the rights and duties of trustees cannot be ascertained by a different law, a case of the beneficiaries following the trustees), unless Malaysian law is indeed the proper law.

The settlor declared 'this trust is a "wakaf au-aulad" ... and shall not fall within the jurisdiction of the wakaf board'. She named her sons and their sons as the trustees after her. It is obvious that the settlor intended that the trust, even though for rustic and charitable purposes, shall be managed by her family. However, Malaysian law would not only be unable to give effect to the settlor's wish of a charitable trust managed by her family, as the Enactment vests in the Majlis Agama Pulau Pinang all wakaf properties and the management of wakaf properties, but would also carry through what the settlor had no wish for — ie to fall within the jurisdiction of the wakaf board, on the basis that the wakaf board is the comparable equivalent of the Majlis Agama, Pulau Pinang. On the wishes of the settlor, it would not be unjust to the plaintiff to confine him to remedies elsewhere.

Furthermore, considering that: (i) the proper forum to grant letters of administration for the estate of the settlor is in India; (ii) the witnesses to the instruments, the trust deed and power of attorney are from India; (iii) the subject matter is not entirely in Malaysia; (iv) the witnesses to

explain the terminology in the settlor's instrument would most reasonably be from India; (v) the beneficiaries who would benefit from the trust would be in Koothanallur, this court is therefore satisfied that an Indian court is the available appropriate forum to determine the plaintiff's application as it is eminently more suitable to hear and determine the plaintiff's application, in the interests of all the parties and the ends of justice. Malaysia is not the natural or appropriate forum, while India is distinctly more appropriate, and all factors point to it being so. There are no circumstances by reason of which justice requires that a stay should not be granted. The second defendant has satisfied this court that it ought to exercise its discretion to grant a stay.

Accordingly, sustaining the plea forum non conveniens, or should it be forum non proprius, it is hereby ordered that this proceedings be stayed.

Proceedings stayed.

Reported by Kenneth Goh